1983

State of Utah v. Charles T. Brown : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KENNETH A. SWIECICKI, Plaintiff-Appellant, vs. BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY, and UNITED STATES DEPARTMENT OF TRANSPORATION, FEDERAL AVIATION ADMINISTRATION, Defendants-Respondents.	:	Case No. 18315

BRIEF OF PLAINTIFF-APPELLANT

Appeal from Determination of the Board of Review
of the Industrial Commission of Utah

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STATEMENT OF THE NATURE OF THE CASE

In this action, plaintiff seeks to obtain unemployment compensation benefits under the Utah Employment Security Act, § 35-4-1 et seq., Utah Code Ann. (1953, as amended).[1]

DISPOSITION IN ADMINISTRATIVE REVIEW PROCEEDINGS

On August 6, 1981,[2] plaintiff was prevented by his employer from reporting to work and was advised his termination was in progress. Plaintiff was officially terminated from his job as an air traffic controller at the Salt Lake International

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[1] Hereinafter, reference to the Utah Code Annotated will be by "U.C.A.", followed by designation of the appropriate section thereof.

[2] All dates herein are in 1981 unless otherwise indicated.

Airport effective September 15. On August 27, plaintiff applied for unemployment insurance benefits. On September 18, plaintiff's application was denied under U.C.A. § 35-4-5(b)(1) and (d). On October 13, plaintiff appealed. On December 30, Appeal Referee, Stanley H. Griffin, affirmed the denial of plaintiff's application for benefits under U.C.A. § 35-4-5(a) and (d). The appeal referee did not rely in any part upon U.C.A. § 35-4-5(b)(1) in so ruling. On January 8, 1982, plaintiff appealed Referee Griffin's decision to the Board of Review of the Industrial Commission of Utah, Department of Employment Security (hereinafter the "Board of Review"). In a decision dated February 16, 1982, the Board of Review (member Richard H. Schone separately concurring) affirmed the Appeal Referee's decision. Pursuant to U.C.A. § 35-4-10(i), plaintiff filed his Petition for Writ of Review herein on March 15, 1982.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the decision of the Board of Review affirming the denial of unemployment benefits to plaintiff. Plaintiff asks the Court to grant him unemployment benefits and award him costs and attorney's fees incurred in his appeals.

STATEMENT OF FACTS[3]

From February 1974 to August 1981, plaintiff was employed by the Federal Aviation Administration (hereinafter "FAA") as an air traffic controller (R. 0040). As of August plaintiff was working at the Salt Lake Air Traffic Control Center. On or about August 3, a nationwide air traffic controllers' strike commenced. While this fact is not expressly stated in the Record, it is acknowledged by plaintiff that a strike commenced on August 3. Plaintiff failed to report for work on August 3, 4 and 5 (R. 0041). Under the guidelines of President Reagan's "amnesty period", air traffic controllers had until their first scheduled shift after 11:00 a.m. Eastern Standard Time, August 5, within which to report to work (R. 0042-0043). Plaintiff's first scheduled shift after the deadline was 8:00 a.m. on August 6 (R. 0042-0043). There is a discrepancy in the record as to the events of August 6, concerning plaintiff's attempts to return to work. It is the testimony of Clyde Denham, chief of the traffic control tower at the Salt Lake International Airport, that plaintiff talked to Warren

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[3] References to the Record on Appeal will be designated "R" followed by the respective page number of the Record. There is some confusion in that part of the record comprised of the transcript of plaintiff's hearing before the Appeal Referee, where names of the people testifying were mis-designated. To correct this problem and to alleviate confusion, the page numbers of the Record will be given and the correct individuals speaking will be named.

Lee (deputy chief of the Salt Lake tower) a few times on the morning of August 6, prior to plaintiff's individual deadline, and was advised as to the time in which he had to report under the "amnesty period". Denham testified further that Lee recorded in a telephone log certain remarks by plaintiff to the effect that he could not report for work immediately because he had "made a promise to a particular individual or group of individuals. I cannot come out there because I would be violating my oath to them". Warren Lee did not testify and the telephone log was not introduced into evidence (R. 0045). Plaintiff's testimony of the events of August 6 was as follows: plaintiff called Lee at the Salt Lake tower at about 7:00 a.m. on August 6, and was informed by Lee that his deadline to report to work was at 8:00 a.m. (R. 0047). Until this conversation, plaintiff had received no official notification or any telegrams informing him of President Reagan's "amnesty period" or how the "amnesty period" applied to him (R. 0041). Plaintiff further testified without contradiction that Denham and Lee gave him an extension to his deadline of "about an hour" (R. 0047). At about 9:00 or 9:15 a.m., on August 6, plaintiff told Lee that he was prepared to report for duty and Lee said that that was "[F]ine" (R. 0047). Lee then gave plaintiff detailed instructions for gaining access to the control tower. In this regard, Lee advised plaintiff that he was to report to the National Guard unit located at the airport,

give his name and show some kind of identification (R. 0047). He would then go through a checkpoint and be transported by the National Guard across the air field to the control tower. Plaintiff was very concerned about this procedure because he had heard rumors that there were armed guards at the checkpoint (R. 0047) and he knew that there were pickets stationed at the entrance to the National Guard checkpoint (R. 0049). Plaintiff denies that he told Lee that he would not report to work because of an "oath." On this subject, plaintiff testified that because of his physical condition he could not endure the reporting procedure described by Lee--"I cannot do something like that at this time" (R. 0047-0048). Concerning his physical condition, plaintiff testified that he had suffered anxiety, insomnia and other disorders since the last few days of July 1981 (R. 0041-0042). As revealed by a letter from Dr. David A. Schein, M.D., Ph.D. (R. 0064), plaintiff was seen and treated on August 7, with follow-up consultations thereafter. Plaintiff's stress-induced emotional and physiological disturbances were treated with Valium (R. 0042, 0064). The factors which caused plaintiff this stress are outlined in plaintiff's written response to the FAA's notice to plaintiff of its intent to terminate him (R. 0062-0063). In addition, during his testimony before the Appeal Referee plaintiff specifically recalled threats of reprisals that he had heard (R. 0048-0049).

Following his conversation with Lee and Denham on the morning of August 6, plaintiff was contacted by the Federal Bureau of Investigation and the Department of Justice and advised that a restraining order was in effect (R. 0041, 0048). This "literally scared the hell out of" plaintiff (R. 0041) and, at approximately 11:30 p.m., August 6, he reported to work (R. 0041, 0049). There were no pickets present at this time (R. 0049). When plaintiff reported to work he was advised by the deputy chief on duty "that an intent to terminate was in progress" and that he should leave the facility immediately (R. 0041).

On August 9, plaintiff received a letter from Clyde Denham (R. 0065-0066) stating that it was the intent of Mr. Denham to remove plaintiff from his job as air traffic control specialist. Plaintiff responded to Mr. Denham's letter with an August 19 letter setting forth his reasons for not reporting for work until 11:30 p.m., August 6. (R. 0062-0063). Plaintiff also orally presented his position to Mr. Denham on August 19. Thereafter, plaintiff received a letter from Mr. Denham, dated September 8, terminating him as an air traffic control specialist effective September 15 (R. 0056).

ARGUMENT

PLAINTIFF DID NOT VOLUNTARILY LEAVE WORK WITHOUT GOOD CAUSE AND, THEREFORE, IS ELIGIBLE FOR UNEMPLOYMENT INSURANCE BENEFITS.

U.C.A. § 35-4-5(a) states that an individual will not be eligible for benefits if the claimant "left work voluntarily without good cause." This disqualification is subject to the proviso

> that no claimant shall be ineligible for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

In addition to this proviso, the statute directs the Industrial Commission to

> consider for the purposes of this act, the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

In determining whether plaintiff is ineligible for unemployment benefits under U.C.A. § 35-4-5(a), it is necessary to analyze and apply the above-noted provisions of the statute. To do this, plaintiff has employed the following analysis: (I) Was plaintiff terminated or did he voluntarily leave work within the meaning of the statute? (II) Assuming that plaintiff voluntarily left work, what was the extent of his leaving work (i.e., did he quit), and do the facts estab-

lish good cause for such leaving? In evaluating the issue of good cause (i.e., defined by the statute as circumstances under which a disqualification would be contrary to equity and good conscience), plaintiff has, pursuant to the provisions of the statute, included herein a discussion concerning the reasonableness of plaintiff's actions (under the circumstances), and the extent to which those actions evidenced a "genuine continuing attachment" to the labor market.

POINT I.

PLAINTIFF WAS TERMINATED.

As established in the Statement of Facts, plaintiff did not know of the time by which he could report to work until he was advised by Warren Lee at approximately 7:00 a.m. on August 6, that he had until 8:00 a.m. that day. During a subsequent conversation with Lee, plaintiff was given an extension of this deadline of approximately one hour. At about 9:00 a.m. or 9:15 a.m. on August 6, plaintiff told Lee that he was prepared to report to work. Lee stated that this would be "[F]ine". However, when Lee told plaintiff of the procedure which had to be followed in order to report, plaintiff realized that he could not physically or emotionally handle the procedure, which procedure involved potential confrontation between armed guards and pickets. As candidly stated by plaintiff,

> "it scared the hell out of me. I, I, all I wanted to do was be a neutral party, get the (?) to work, get my paycheck, get the hell out. I don't want to be caught in them wars there." (R. 0048)

Some time later that day, plaintiff was advised by the FBI and the Department of Justice that a restraining order was in effect. This "literally scared the hell out of" plaintiff, and he reported to work at about 11:30 p.m. that night, when no pickets were present. Upon reporting to work, plaintiff was told to leave because an intent to terminate was in progress. Thereafter, plaintiff received a notice of intent to remove from the FAA, dated August 9. Although plaintiff submitted a written and verbal response to this notice, he was terminated effective September 15 (R. 0056).

These facts simply do not establish that plaintiff voluntarily left work in the sense that he "quit" so as to be disqualified from receiving benefits for the period after his attempt to report to work. On the contrary, the facts reveal that for the first days of the strike plaintiff was emotionally and physically incapable of reporting to work. When plaintiff finally was able to agree to report to work on the morning of August 6, he was immediately confronted with a reporting procedure fraught with potential confrontation between armed guards and pickets. Initially, plaintiff was physically and emotionally unprepared and unable to cope with this procedure. However, following contact by the FBI and the Department of

Justice, plaintiff was able to pull himself together and he reported to work. Certainly, plaintiff did not feel or believe that he had "quit" work and the actions of the FAA belie any such conclusion, in that they sent plaintiff a letter of intent to remove, solicited and considered verbal and written responses from plaintiff and sent plaintiff a termination notice. At no time has the FAA ever asserted that plaintiff quit his job.

At most, it could be argued (but it is not conceded by plaintiff) that under these circumstances plaintiff should be disqualified for the period August 3 through 11:30 p.m. August 6 under the theory that during this period he left work voluntarily without good cause. However, the facts cannot support the finding that by reporting late, plaintiff permanently and irrevocably quit his employment so as to justify a disqualification under U.C.A. § 35-4-5(a) for the period on and after 11:30 p.m. August 6. What is meant by voluntarily leaving work for purposes of § 35-4-5(a) is something more than reporting to work late. It means an act, such as retiring, which establishes an intent to permanently cease work. See, Denby v. Board of Review of Industrial Commission, 567 P.2d 626 (Ut. 1977).

What the Appeal Referee and the Board of Review have done by their rulings is to seize upon U.C.A. § 35-4-5(a) and apply it to a situation that legally and factually amounts to a

termination, which, as recognized by Tom L. Brant in his decision of September 18 (R. 0054), must be evaluated under the provisions of U.C.A. § 35-4-5(b)(1). When examined under this later section, plaintiff's post-August 6 disqualification cannot be sustained. Thus, under the circumstances of this case, plaintiff's conduct does not, as a matter of law, rise to the level of conduct which is "deliberate, wilful or wanton and adverse to the employer's rightful interest", as required by this section of the statute. See, Continental Oil Company v. Board of Review of the Industrial Commission of Utah, 568 P.2d 727 (Ut. 1977).

POINT II.

PLAINTIFF HAD GOOD CAUSE FOR REPORTING TO WORK LATE.

Even assuming that U.C.A. § 35-4-5(a) applies (because plaintiff "left work voluntarily" when he reported to work beyond his deadline as extended by Lee on the morning of August 6), the undisputed facts establish that there was good cause for this delay in reporting.

The only recent Utah Supreme Court case dealing with U.C.A. § 35-4-5(a), the "voluntary quit" section of the Utah Employment Security Act, is Denby v. Board of Review of the Industrial Commission of Utah, 567 P.2d 626 (Ut. 1977). While the facts of Denby are quite different from those of the instant case, the statements of the Court on the standard of "good cause" are applicable. In Denby the plaintiff volun-

tarily retired from the United States Postal Service in order to move to his brother's ranch in Montana. He applied for unemployment insurance benefits. His application was denied, in part, on grounds not applicable in the instant case, i.e., because he did not make a reasonable and active attempt to find work, as required by U;C.A. § 35-4-4(c). In addition to affirming the finding of disqualification under U.C.A. § 35-4-4(c), the Supreme Court upheld Denby's disqualification for a four-week period under U.C.A. § 35-4-5(a), on the ground that Denby left work voluntarily, without good cause. In so holding, the Court affirmed the appeal referee's decision that Denby's asserted reasons for retiring (that he suffered from arthritis and mental stress and that mandatory overtime was a contributing factor) did not amount to "compelling reasons" for his retirement. The Court went on to explain that the question of "good cause" for voluntarily leaving employment is a question of law and fact for the administrative agency. Citing two Oregon cases, the Court said that "good cause" is

> such cause as would similarly affect persons of reasonable and normal sensitivity, and is limited to those instances where the unemployment is caused by external pressures so compelling that a reasonably prudent person, exercising ordinary common sense and prudence, would be justified in quitting under similar circumstances.

Denby v. Board of Review of Industrial Commission, 567 P.2d 626, 630 (Ut. 1977).

In evaluating the issue of good cause in this case, it is critical to bear in mind that the act of plaintiff to be examined is his failure to report to work during the period from approximately 9:15 a.m. to 11:30 p.m. on August 6, and not his failure to report to work on August 3, 4, or 5. This follows since those controllers who missed all or part of these latter days, but then returned to work within President Reagan's "amnesty period", were not penalized in any manner for having missed work on these days.

As set forth under Point I above, plaintiff did not intend to voluntarily quit his job when he delayed reporting for work on August 6. All the facts of this case compel the conclusion that plaintiff desired to keep his job. However, plaintiff was subjected to the following external pressures which caused him emotional and physical problems, resulting in his delay in reporting to work:

1. statements by union officials that those who reported to work would be "taken care of" (R. 0049, 0062-0063);

2. information that those who were working were being harassed (R. 0062-0063);

3. misrepresentations by union officials as to what would be done by the FAA to those who returned to work (R. 0062-0063);

4. unclear/confusing information concerning the President's amnesty period and how it applied to plaintiff (R. 0062-0063);

5. a reporting procedure that allowed for the possibility of potential violence (i.e., armed guards confronting pickets).

On their face, items 1 and 2 above may not appear compelling. However, as shown in the case of Anthan v. PATCO, 521 F.Supp. 1 (E.D. Mo. 1981), due to the high degree of cooperation and assistance which is required between air traffic controllers, a controller who is shunned by other controllers can be placed in a life-endangering situation and prevented from effectively performing his job. In Anthan, supra, the court awarded the plaintiff compensatory and punitive damages as a result of the work-related outrageous conduct of his fellow controllers.

In examining the question of good cause, determining the intent of the Legislature is very important. As observed in Denby, supra at 630:

> The Legislature contemplated that when an individual voluntarily leaves a job under the pressure of circumstances which may reasonably be viewed as having compelled him to do so, the termination of his employment is involuntary for purposes of this act.

Furthermore, the lack of findings of fact by the appeal referee and the Board of Review on the above circumstances compels the conclusion that they did not consider the

equity and good conscience provisions of U.C.A. § 35-4-5(a). These provisions require the Industrial Commission to examine whether, under the circumstances of the individual case, plaintiff's actions were reasonable and evidenced "a genuine continuing attachment to the labor market. . . ". Based upon these circumstances, the Commission must then decide whether a disqualification is contrary to equity and good conscience.

The circumstances cited above may not have justified plaintiff in permanently leaving his work. However, these factors are sufficiently compelling within the definition of the phrase "good cause" as defined in Denby, supra, to justify plaintiff's delay in reporting to work for several hours past his deadline.

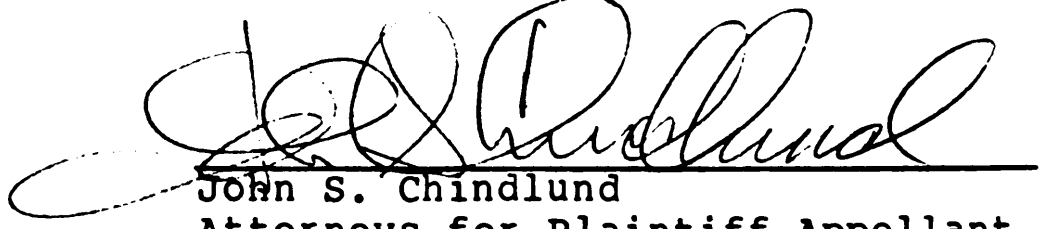
CONCLUSION

The undisputed facts, including those found by the appeal referee and the Board of Review and those appearing as undisputed in the Record, establish that the action of the Board of Review was arbitrary, capricious and unreasonable in disqualifying plaintiff for benefits after he attempted to report to work several hours after the expiration of his "deadline" on August 6. As openly revealed by the concurring opinion of Board member, Richard H. Schone, the decision in plaintiff's case was not a decision on the individual facts of plaintiff's case, but rather, a decision on the overall issue of the air traffic controllers' strike. There is no evidence

in the record to show that plaintiff engaged in or supported the strike. On the contrary, the evidence establishes that plaintiff wanted to work and attempted to do so as best he could under the circumstances. Furthermore, the issue of whether the FAA had good or legal cause to terminate plaintiff or other air traffic controllers should not have been the question before the Board of Review. Rather, the question was whether plaintiff, under the facts of his individual case, was entitled to receive unemployment benefits under the Utah Employment Security Act. Under the facts of this case, plaintiff is entitled to such benefits for the period following his attempt to return to work on August 6.

DATED this 24th day of June, 1982.

PRINCE, YEATES & GELDZAHLER



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MAILING CERTIFICATE

On this 25th day of June, 1982, I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Brief of Plaintiff-Appellant to the following:

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